David D. Bach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This case involves two fundamental questions under the Constitution: whether the Second Amendment is incorporated through the Fourteenth Amendment to apply against the States, and whether under Article IV, § 2's Privileges and Immunities Clause the State of New York may deny the privilege of obtaining a license to carry a handgun to a nonresident who is willing to comply with every State requirement but is denied the opportunity to do so solely on the basis of nonresidency. Petitioner David D. Bach ("Bach") brought this challenge to New York's statutory handgun licensing regime, which excludes virtually all nonresidents from carrying or even possessing a handgun in New York for any purpose. Although the Second Circuit characterized Bach as a "model citizen," and although it accepted that Bach is willing to comply with all of the State's requirements for handgun possession—including submitting to the same background checks, licensing procedures, and monitoring efforts imposed upon residents—the Second Circuit held that it was obliged to reject Bach's constitutional challenge to New York's regime.

The Second Circuit based its holdings on two grounds, either of which warrants this Court's review. *First*, the court held that it could not even consider Bach's Second Amendment arguments or examine the constitutionality of the New York regime, because it had no choice but to follow this Court's antiquated decisions in *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), until this Court overruled them. Those decisions, however, rest on constitutional underpinnings that this Court repeatedly has rejected as it has continually and consistently held that other rights under the Bill of Rights *are* incorporated as against the States under the Fourteenth Amendment. The question whether

the Second Amendment also is incorporated as against the States has been the subject of considerable ferment in the courts of appeals, with the Fifth and Ninth Circuits ruling that this Court's precedents undermine the position that States are not bound by the Second Amendment and five circuits holding that they are bound by *Presser* and *Cruikshank* until this Court overrules them.

Second, the Second Circuit rejected Bach's challenge to New York's exclusion of nonresidents from its licensing regime on the grounds that it violated the Privileges and Immunities Clause of Article IV, § 2, of the Constitution. That decision is flatly inconsistent with this Court's well-developed privileges and immunities doctrine. Under this Court's precedent, the State bears a heavy burden to justify such naked discrimination concerning important rights guaranteed to residents but denied nonresidents. The Second Circuit did not require the State to meet that burden to present a substantial justification for the discrimination and to demonstrate that the discrimination was narrowly tailored to its licensing goals. As it has done in past Privileges and Immunities Clause cases, this Court should grant a writ of certiorari to consider the constitutionality of New York's statutory scheme.

OPINIONS BELOW

The opinion of the district court (Pet. App. 34a-53a) is reported at 289 F. Supp. 2d 217. The opinion of the court of appeals (*id.* at 1a-33a) is reported at 408 F.3d 75.

JURISDICTION

The court of appeals entered its judgment on May 6, 2005. A timely petition for rehearing was denied on July 21, 2005. Pet. App. 54a. On October 11, 2005, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including December 19, 2005. *Id.* at 101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth at Pet. App. 55a-100a.

STATEMENT OF THE CASE

A. This case involves a constitutional challenge to New York's gun licensing regime on the ground that it categorically prohibits nonresidents who do not work or own a business in the State from applying for or receiving a handgun license. New York criminalizes the possession of handguns and other firearms by individuals who do not have a valid New York license.

Plaintiff David Bach is a lawyer in the United States Navy's Office of General Counsel and a Commissioned Officer in the United States Naval Reserve with more than 25 years of service, including 12 years of active duty as a U.S. Navy SEAL. He holds a Department of Defense Top Secret Security Clearance and has extensive training and experience with firearms. *See* Summons and Complaint, *Bach v. Pataki, et al.*, No. 1:02cv1500, at 3 (N.D.N.Y. filed Nov. 29, 2002). Bach recently returned from a tour of active military duty in Iraq. Bach is a citizen of the Commonwealth of Virginia with no criminal record, and he has a license issued by that State to carry a concealed firearm—the same handgun he seeks to carry in New York. *See* Pet. App. 2a. Bach frequently drives to upstate New York, where he grew up, and where he, his wife, and his three young children visit his elderly parents. *Id.* Seeking to protect his family during their car trips to New York, Bach made inquiries to New York authorities about obtaining a gun permit in that State. *Id.* at 38a-39a. Those authorities advised him, however, that "[t]here are no provisions for the issuance of a carry permit, temporary or otherwise, to anyone not a *permanent* resident of New York State." *Id.* at 2a, 39a (emphasis added). Without a license, Bach's possession of a gun in the State would be a felony. *See* N.Y. Penal Law §§ 265.00(3), 265.20, 400.00.

Lacking any recourse through State channels, Bach filed suit in the United States District Court for the Northern District of New York on November 29, 2002, seeking a declaration that the State's absolute prohibition on licenses for nonresidents was unconstitutional, and requesting preliminary and permanent injunctive relief. The complaint alleged that the State's licensing regime was unconstitutional, on its face and as applied to Bach, on two principal grounds.[1] First, Bach alleged that New York's licensing law discriminated against nonresidents in violation of the Privileges and Immunities Clause of Article IV, § 2, which guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Pet. App. 55a. Bach also alleged that the licensing ban violated the right of nonresidents to "keep and bear Arms" protected by the Second Amendment of the United States Constitution. *Id.*

B. The district court granted the State's motion to dismiss the complaint on September 23, 2003. While acknowledging disagreement among the courts of appeals on the nature and scope of the right protected by the Second Amendment, the district court followed the lead of "most other circuit courts" and held that "the Second Amendment is not a source of individual rights." Pet. App. 45a, 46a. It also dismissed Bach's claim under the Privileges and Immunities Clause on the ground that the State had "valid reasons for the disparate treatment of nonresident travelers." *Id.* at 48a.

C. Bach timely appealed, and the Second Circuit affirmed the district court's dismissal. Unlike the district court, the court of appeals decided there was "no need" to enter into the "national legal dialogue" regarding the scope of the Second Amendment's protections. Instead, the court

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[1] Bach also alleged that the New York law violated the Equal Protection Clause and the substantive aspect of the Due Process Clause of the Fourteenth Amendment. The district court rejected those claims, and Bach did not challenge their dismissal in the court of appeals.

held "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." Pet. App. 14a. The court of appeals believed this conclusion to be "compelled" by this Court's opinion in *Presser v. Illinois*, 116 U.S. 252 (1886). Pet. App. 15a.

In *Presser*, this Court rejected a challenge to an Illinois statute that made it unlawful for individuals who were not in the military or the state militia "to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof." 116 U.S. at 253. The Court rejected the constitutional challenge to that statute on the ground that "the [Second] [A]mendment is a limitation only upon the power of [C]ongress and the national government, and not upon that of the [S]tate." *Id.* at 265. The Court in *Presser* relied, in turn, on *United States v. Cruikshank*, 92 U.S. 542 (1876). *Cruikshank* involved a challenge by defendants convicted under the Enforcement Act, ch. 114, 16 Stat. 140 (May 31, 1870), for (among other things) unlawfully conspiring to intimidate black citizens with "an intent to hinder and prevent the exercise by the same persons of the 'right to keep and bear arms for a lawful purpose.'" 92 U.S. at 544-45. To prove a violation of the Act, the government had to show that "the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States." *Id.* at 549. The Court overturned the convictions on the ground that the Second Amendment did not protect any right against intrusion by other private citizens. Rather, the Court held that the Second Amendment "means no more than that [the right to keep and bear arms] shall not be infringed *by Congress*." *Id.* at 553 (emphasis added).

The court of appeals acknowledged that both the Fifth Circuit and the Ninth Circuit had expressed doubts about the continued validity of *Presser* and *Cruikshank*, because both rested on the now-discredited holding in *Barron v.*

Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, this Court held that the entire Bill of Rights does not apply to the States. Two decades after *Cruikshank*, this Court rendered its first decision rejecting that conclusion by holding that certain rights protected under the first eight amendments are, in fact, incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *See Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897). Nevertheless, the Second Circuit below held that, "even if a Supreme Court precedent was 'unsound when decided' and even if it over time becomes so 'inconsistent with later decisions' as to stand upon 'increasingly wobbly, moth eaten foundations,' it remains the Supreme Court's 'prerogative alone to overrule one of its precedents.'" Pet. App. 18a (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20 (1997)) (internal quotation marks omitted). The court stated that Bach's argument that *Presser* and *Cruikshank* were no longer good law had to be addressed to this Court, essentially inviting this Court's review of those antiquated precedents. *See id.*

The court of appeals also affirmed the district court's rejection of Bach's claim of residency discrimination under the Privileges and Immunities Clause. The court assumed, without deciding, that a license to carry a gun constitutes a "privilege" protected by Article IV, noting that this Court "'has never held that the Privileges and Immunities Clause protects only economic interests.'" *Id.* at 24a-25a (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 & n.11 (1985)). It also acknowledged that "[t]here is no question that New York discriminates against nonresidents in providing handgun licenses." *Id.* at 26a. Nonetheless, the court upheld New York's discriminatory licensing regime.

First, it credited the State's "monitoring interest" in "continually obtaining relevant behavioral information" about licensees. *Id.* at 27a. Then, it turned to the question whether the "degree of discrimination exacted" was "substantially related to the threatened danger." *Id.* at 28a. Although it acknowledged that this was the "more

difficult inquiry," the court concluded that the New York regime was justifiable because "New York can best monitor the behavior of those licensees who spend significant amounts of time in the State." *Id.* at 29a. The court concluded that it would be too "difficult for New York to monitor the behavior of mere visitors." *Id.* It also rejected Bach's contention that New York's monitoring interest could be adequately protected by the vigilance of the State of the licensee's residence, or that the behavioral information sought by New York could be obtained by means short of insisting on permanent residency or employment within its borders.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION DEEPENS A CIRCUIT CONFLICT ON WHETHER *PRESSER* AND *CRUIKSHANK* REMAIN GOOD LAW, A QUESTION ONLY THIS COURT CAN RESOLVE

The Second Circuit held that it was bound by this Court's decisions in *Presser* and *Cruikshank* to hold that the Second Amendment's "right to keep and bear arms" binds only the national government, and not the States. The Second Circuit's holding is in accord with four other circuits, but the Fifth and Ninth Circuits have disagreed. Those courts have stated that *Presser* and *Cruikshank* are no longer sound in light of the modern doctrine of incorporation. This Court's reconsideration of its prior decisions in *Presser* and *Cruikshank* is appropriate given the deepening division among the lower courts on an issue of national importance. If left to stand, the Second Circuit's holding, and that of other circuits, insulates state laws like New York's from any constitutional scrutiny whatsoever, regardless of how restrictive such laws are of the rights guaranteed by the Second Amendment.

A. *Presser* And *Cruikshank* Should Be Reevaluated In Light Of The Modern Doctrine Of Incorporation

As originally interpreted by this Court in *Barron*, the first eight provisions of the Bill of Rights applied only to the national government, and not to the States. The question, Chief Justice Marshall thought, was "of great importance, but not of much difficulty." 32 U.S. (7 Pet.) at 247. Because the Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states," it necessarily followed that the Bill of Rights should "be understood as restraining the power of the general government, not as applicable to the states." *Id.* The Fourteenth Amendment, however, expressly applies to the States, forbidding them from "deprivf ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Using the Bill of Rights for guidance, the Court has held the Fourteenth Amendment to "incorporate" all but four provisions of the Bill of Rights against state action.

In refusing to address the merits of P[illegible]h's Second Amendment claim, the Second Circuit relied on an outdated line of cases consisting of *Presser* and *Cruikshank*, which—along with *Miller v. Texas*, 153 U.S. 535 (1894)—adhered to *Barron*'s holding and have by now been thoroughly undermined by this Court's subsequent incorporation doctrine. That doctrine has led to the overruling of these same cases insofar as they had held that other provisions of the Bill of Rights applied only to the national government. *Barron*'s holding that the Takings Clause of the Fifth Amendment did not apply against the States was overruled in the earliest of the incorporation cases. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 480 n.10 (1987) (citing *Chicago, B. & Q.R.R.*, 166 U.S. 226). *Cruikshank*'s holding that the First Amendment right of peaceable assembly "was not intended to limit the powers of the State governments in

respect to their own citizens," 92 U.S. at 552, has long since been disavowed, *see Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). So too has *Miller*'s holding that the Fourth Amendment right against unreasonable searches and seizures cannot be enforced against the States. *See Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Indeed, we have found no case from this Court rejecting incorporation of an individual right in the Bill of Rights as against the States since the Court began to render holdings under the modern incorporation doctrine.

It is thus clear that the doctrinal foundation of *Presser* and *Cruikshank* "has since been superseded by ratification of the Fourteenth Amendment and selective incorporation of the Bill of Rights." *Delaware v. Van Arsdall*, 475 U.S. 673, 706 (1986) (Stevens, J., dissenting). Even the Second Circuit acknowledged that these prior cases rest on "moth-eaten foundations" and are "inconsistent with later decisions." Pet. App. 18a (internal quotation marks omitted). These antiquated precedents thus provide a historically outdated answer to whether the Second Amendment applies to the States. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1989) ("The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception. Why, that is, should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other 'pre-incorporation' decisions refusing to apply given aspects of the Bill of Rights against the states?"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1263-64 (1992). Yet this Court has never addressed whether, under modern incorporation doctrine, the Second Amendment's "right to keep and bear arms" should apply to the States. This case presents a perfect opportunity to do so.

There is no sound reason for excluding the Second Amendment's "right to keep and bear arms" from the panoply of rights protected against violation at the hands of state officials. The history of Reconstruction and the ratification of the Fourteenth Amendment make clear that the "right to keep and bear arms" was not intended to be excluded from incorporation against the States. For example, during Congress's discussion of the Fourteenth Amendment, Senator Jacob Howard of Michigan explained that the "great object" of Section 1 of the Fourteenth Amendment was to "restrain the power of the States" and keep them from abridging "the personal rights guarantied and secured by the first eight amendments of the Constitution," including "the right to keep and to bear arms." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Jacob Meritt Howard).

The passage by the Reconstruction Congress of the Civil Rights Act of 1866 and the Freedman's Bureau Act provides further evidence that the Second Amendment was intended to apply to the States. The Civil Rights Act entitled all "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude," "the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (Apr. 9, 1866). The Freedman's Bureau Act was even more explicit, providing that the "full . . . benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Freedman's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176 (July 16, 1866) (emphasis added). As Professor Amar has observed, "the Second Amendment right to bear arms—and presumably all other rights and freedoms in the Bill of Rights—were encompassed by both the Freedman's

Bureau Act and its companion Civil Rights Act." Amar, *The Bill of Rights*, 101 Yale L.J. at 1245 n.228.

The Second Amendment also meets the modern test for incorporation set forth in *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the Court explained that "[t]he test for determining whether a right [should be] protected against state action by the Fourteenth Amendment has been phrased in a variety of ways." *Id.* at 148. The Court has inquired, variously, whether a right is "among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; whether it is "basic in our system of jurisprudence"; and whether it is a "fundamental right, essential to a fair trial." *Id.* at 148-49 (internal quotation marks omitted). At bottom, however, *Duncan* explained that the core inquiry, however formulated, is whether the right has traditionally been regarded as having a central place in the constitutional constellation. *See id.* at 151-56 (analyzing the historical roots of the jury trial right).[2] The Second Amendment easily meets this standard.

The right to keep and bear arms has been viewed by numerous scholars and commentators as fundamental since long before the Founding. Sir William Blackstone recognized the right to possess arms as one of the five

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[2] *Duncan* ushered in the modern doctrine of "selective" incorporation by rejecting this Court's previous insistence that a right be so "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people" that "a fair and enlightened system of justice would be impossible without them," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), a standard rarely satisfied. *See Duncan*, 391 U.S. at 149 n.14. Instead, *Duncan* deemed it sufficient that the right be fundamental within the distinctly "Anglo-American regime of ordered liberty." *Id.* (noting that this liberalization of the test was necessary to justify the incorporation of certain rights such as the exclusionary rule and the rule against prosecutors' commentary on the defendant's refusal to testify). *See also Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914) (Holmes, J.) (suggesting that the right to carry a firearm for self-defense is protected by the Fourteenth Amendment's liberty clause).

fundamental rights: "The fifth and last auxiliary right of the [s]ubject . . . is that of having arms for their defence." 1 William Blackstone, *Commentaries on the Laws of England* 139 (University of Chicago Press 1979) (1765). When the right to bear arms "came to America with English colonists," it, like the jury trial right at issue in *Duncan*, "received strong support from them." *Duncan*, 391 U.S. at 152. Fear of standing armies ran deep. *See, e.g.*, The Federalist No. 46 (James Madison). As Joseph Story wrote:

> The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.

Joseph Story, *Commentaries on the Constitution of the United States* § 1001, at 708 (Carolina Academic Press 1987) (1833).

The States also recognized a right to keep and bear arms in their own laws. *Cf. Duncan*, 391 U.S. at 153 (noting that "[t]he constitutions adopted by the original States guaranteed jury trial," as did the constitutions of later-joining States). At the time of the Bill of Rights, almost half of the State bills of rights contained a similar right to keep and bear arms, and all of them recognized the importance of a populace with access to arms as a guarantee against tyranny. *See* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 54 (1996); David E. Young, *The Origin of the Second Amendment* at xxvi-xxix (Golden Oak Books 2d ed. 1995) (1991). Still today, 43 of the 50 States enshrine the right to "keep and bear" arms in their constitutions. *See* Lund, 31 Ga. L. Rev. at 54.

The historical evidence is plentiful that the Founders viewed the right to "keep and bear arms" to be an important principle in the pursuit of ordered liberty. Thus,

there are compelling reasons to conclude that the Second Amendment meets this Court's test for rights that warrant incorporation.

B. This Court's Consideration Is Appropriate Now Because Of The Deepening Circuit Conflict On This Important Question

This Court's resolution of the applicability of the Second Amendment against the States is appropriate given the division of views among the circuits. The issue of incorporation is an important one. The Second Amendment is one of only four provisions of the Bill of Rights that have not been incorporated against the States under the doctrine of "selective" incorporation—the others being the right against quartering soldiers, and the rights to grand and civil juries. *See* U.S. Const. amends. III, V, VII.[3] This Court has never explained its exclusion of those amendments, including the Second, from the panoply of rights deserving protection against state action. This case presents the Court with the opportunity to apply modern incorporation principles to the Second Amendment.

The question of incorporation of the Second Amendment in particular has significant practical consequences for the Nation. All 50 States have passed myriad laws restricting, to varying degrees, individuals' rights to purchase, possess, and carry firearms of all kinds. *See generally* U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, Midyear 2004*, at 20-74 (Aug. 2005) ("DOJ Statistics Report"), http://www.ojp.

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[3] As Bach argued below, the Second Circuit has, in fact, concluded that the "Third Amendment is incorporated into the Fourteenth Amendment for application to the states." *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982). But the panel here concluded that *Engblom*'s incorporation of the Third Amendment "in the absence of a Supreme Court decision doing so" was "not relevant to the question before us," because it did not address the issue "whether this Court can overrule the Supreme Court" and incorporate the Second Amendment. Pet. App. 18a n.24. The Second Circuit concluded that it was bound to follow *Presser* until it was overruled by this Court.

usdoj.gov/bjs/pub/pdf/ssprfsm04.pdf (surveying gun laws of the States and U.S. territories). Whatever the scope of the individual right protected by the Second Amendment, there is a strong need for clarifying whether that right applies at all to these types of state regulations.

The division among the courts of appeals amplifies the importance of revisiting this Court's prior precedents. Five of the eleven relevant circuits,[4] including the court below, continue to follow this Court's holdings in *Presser* and *Cruikshank*. These courts have not endorsed the outcome or reasoning of these cases, but simply have followed them as precedents of this Court that have never been overruled. *See, e.g.*, Pet. App. 14a & n.22 (citing cases); *People's Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942). As was the case here, all state laws restricting gun ownership and use will remain insulated from constitutional scrutiny until this Court reconsiders the 19th century decisions that provide the basis for those circuits' holdings that the Second Amendment is not incorporated against the States.

Both the Fifth and Ninth Circuits have, by contrast, disagreed with the continuing vitality of *Presser* and *Cruikshank*. In *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003), the Ninth Circuit stated that it views *Cruikshank* and *Presser* as "thoroughly discredited" given subsequent incorporation cases. *Id.* at 1066 n.17. The Ninth Circuit in *Silveira* technically did not reach the incorporation issue, because it held that, given the "collective" nature of the right, the plaintiffs in that case lacked standing to challenge California's gun laws on Second Amendment grounds. *Id.* at 1066. Because of the court's decision on standing, *Silveira*

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[4] Neither the Federal Circuit nor the D.C. Circuit would be expected to have occasion to address the incorporation question.

will likely be the Ninth Circuit's last word on the topic of incorporation of the Second Amendment.

The Fifth Circuit also has expressed its view that *Presser* and *Cruikshank* are no longer valid. In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit stated that *Presser*, *Cruikshank*, *Barron*, and *Miller* "all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us." *Id.* at 221 n.13. *Emerson* involved a defendant's Second Amendment challenge to his prosecution under the federal felon-in-possession law, 18 U.S.C. § 922(g), not a challenge to any state action. But, given this Court's admonition that lower courts must "follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions," *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), the Fifth Circuit cannot bring its view to bear on a Second Amendment challenge to state action. Nevertheless, the Fifth and Ninth Circuits' considered disagreement with five other circuits on this important issue strongly indicates the need for this Court's resolution. Indeed, there is no reason for this Court to wait for further percolation of this issue in the lower courts, as all those courts will remain indefinitely bound by *Presser* and *Cruikshank* until this Court reconsiders those decisions.

C. This Court Need Not Fully Define The Substantive Scope Of The Second Amendment's "Right To Keep And Bear Arms" To Resolve The Incorporation Issue

New York law absolutely prohibits the possession and carrying of handguns by virtually all nonresidents. Bach contends that these severe restrictions violate his Second Amendment "right to keep and bear arms." Notably, Bach

does not challenge New York's ability to require firearms licenses in the first instance, as he is willing to submit to the same licensing requirements imposed on residents. And he seeks only to carry—either in the open or concealed—the same type of handgun to be used for self-defense that New York licenses its own residents to possess. That New York does not permit Bach—whom the Second Circuit recognized as a "model citizen," Pet. App. 2a—to receive any individual consideration of his particular fitness and need to carry a handgun, even with a license, raises serious doubts as to whether such a restrictive law could survive constitutional scrutiny. Given, however, that the Second Circuit dismissed Bach's complaint on the basis of *Presser*, Bach respectfully requests that this Court grant certiorari on the threshold incorporation issue. If the Court decides that the Second Amendment applies to the States, it may then either decide Bach's challenge on the merits or remand to the Second Circuit for further consideration of whether New York's prohibition against nonresidents violates Bach's substantive constitutional rights.[5]

The substantive scope of the individual right guaranteed by the Second Amendment has been the subject of increasing debate among both courts and commentators. There are two principal camps, with some advocating that the Second Amendment protects a right to keep and bear arms for private purposes (the "individual rights" view), and others proposing that the right exists only when citizens are called together in the context of organized military service (the "collective rights" model). For example, the Ninth Circuit in *Silveira*, analyzing the text and history of the amendment, read the phrase "keep and bear arms" to refer "to the carrying of arms in military service—not the private use of arms for personal purposes." 312 F.3d at 1072. It thus held that "[t]he [Second]

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[5] Bach's constitutional challenge to New York's law included an as-applied challenge as well as a facial challenge. *See* Pet. App. 3a.

[A]mendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use." *Id.* at 1066. The Fifth Circuit in *Emerson* has taken a starkly different view of that language and history. That court has held that ownership and possession of firearms for nonmilitary, purely personal purposes *was* intended to be protected. That conclusion led the court to conclude "that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." 270 F.3d at 260. The issue has been vigorously debated in the academic literature as well. *See, e.g., Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing scholarly articles on both sides of the debate).

This Court's pronouncements point toward the individual rights view. In *United States v. Miller*, 307 U.S. 174 (1939), the only decision of this Court squarely to address the Second Amendment, the Court confronted a challenge to an indictment charging the defendants with interstate transportation of an unregistered "Stevens shotgun having a barrel less than 18 inches in length," in violation of the National Firearms Act. *Id.* at 175. The district court held that the federal law violated the Second Amendment. In reversing and remanding, this Court declined to adopt the government's principal contention that the right secured by the Second Amendment is "only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." Brief of United States at 15, *United States v. Miller*, 307 U.S. 174 (Mar. 1939) (No. 696). Rather, the Court relied on the government's fallback position that the firearm at issue in that case—a shotgun with a barrel of less than 18 inches—was not among the class of "arms" covered by the Second Amendment. *See Emerson*, 270 F.3d at 223-24.

In the years since *Miller* was decided, statements made by members of this Court suggest agreement with a more individualistic view of the rights protected by the Second Amendment. Indeed, a number of the current Justices of this Court have expressed the view in other cases that the Second Amendment is among those constitutional rights guaranteed to individuals against state "abridgement." *See, e.g., Planned Parenthood v.* Casey, 505 U.S. 833, 848 (1992) (enumerating the "right to keep and bear arms" along with other individual rights protected by the Constitution) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)); *Albright v. Oliver*, 510 U.S. 266, 307 (1994) (Stevens, J., dissenting) (same); *Printz*, 521 U.S. at 937-38 (Thomas, J., concurring) ("The First Amendment . . . is fittingly celebrated for preventing Congress from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech.' The Second Amendment similarly appears to contain an express limitation on the government's authority."); *id.* at 938 n.1, 939 (noting that in *Miller* "[t]he Court did not . . . attempt to define, or otherwise construe, the substantive right protected by the Second Amendment," but that "[p]erhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic'") (quoting 3 Joseph Story, *Commentaries* § 1890, at 746 (1833)). *See also* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 99 (1999) ("the thirty-five other Supreme Court cases which quote, cite, or discuss the Second Amendment . . . suggest that the Justices of the Supreme Court do now and usually have regarded the Second Amendment . . . as an individual right"); 1 Laurence H. Tribe, *American Constitutional Law* 901-02 n.221 (Foundation Press 3d ed. 2000) (1978) (concluding that the Second Amendment protects the right of "individuals to possess and use firearms in the

defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action").

Likewise, the United States Department of Justice ("DOJ") recently performed an exhaustive review of the relevant case law, the text and structure of the Second Amendment, the relevant history, and the academic commentary concerning the Amendment. In its *Memorandum Opinion for the Attorney General* entitled "Whether the Second Amendment Secures an Individual Right" (dated Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf,[6] the DOJ concluded that the "text and structure of the Constitution support the individual-right view of the Second Amendment," a view that "finds further support in the history that informed the understanding of the Second Amendment as it was written and ratified." *Id.* at 2 (noting that "the views of commentators and courts closest to the Second Amendment's adoption . . . reflect an individual-right view"). *See also* Senate Subcomm. on the Constitution, 97th Cong., *The Right to Keep and Bear Arms* at viii (Comm. Print 1982) ("What the Subcommittee on the Constitution uncovered was clear . . . proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms.").

The Court need not resolve this debate, however, to consider whether the right to keep and bear arms under the Second Amendment—whatever its substantive scope—should bind state and municipal entities as well as the national government. It is indisputable that the Second

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[6] Petitioner will lodge copies of this document with the Court upon request.

Amendment, by its plain language, protects a right of "the people." That right—like the right of "the people" against unreasonable searches and seizures in the Fourth Amendment—necessarily implies protection of some substantive sphere of liberty on the part of citizens against government authority. *See Printz*, 521 U.S. at 937-38 (Thomas, J., concurring).

Resolving whether the state and local governments as well as the national government are equally restricted does not require this Court in this case to define exactly when and under what circumstances the people's right to use and possess firearms exists, or can legitimately be restricted. In other contexts, this Court's jurisprudence regarding the substantive scope of constitutionally protected liberties has continued to evolve long after the question of incorporation was resolved. *Compare Wolf*, 338 U.S. at 27-28 (incorporating the Fourth Amendment's ban on unreasonable searches and seizures), *with Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to the States). Incorporation against the States is merely the opening step to allow jurisprudence concerning the Second Amendment similarly to evolve.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S LONGSTANDING PRIVILEGES AND IMMUNITIES JURISPRUDENCE

Article IV, § 2's Privileges and Immunities Clause provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. This Court has explained that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), *overruled on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988).

Among other things, the Clause "inhibits discriminating legislation against [nonresidents] by other States," "it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness[,] and it secures to them in other States the equal protection of their laws." *Paul*, 75 U.S. (8 Wall.) at 180; *see Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *see also Saenz v. Roe*, 526 U.S. 489, 500 (1999) (the "right to travel" generally guarantees "the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State").

While the Clause is "not an absolute," "[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Accordingly, to justify differential treatment of nonresidents, the State must show that "there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398; *see Hicklin*, 437 U.S. at 526. Otherwise, discrimination on the basis of residency violates both the nonresident's individual rights and the limitations on state authority imposed by the principles of federalism. *See Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ("The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.") (footnote omitted).

New York's law clearly and categorically discriminates against nonresidents in the provision of licenses to possess or carry firearms. New York's law is among the most severe in its restrictions on licensing nonresidents. Most other States' laws allow nonresidents to obtain permits either through reciprocity arrangements with other States or by satisfying prescribed licensing standards applicable

to nonresidents.[7] Bach's case could not provide a better example of the law's severity: Bach was "statutorily ineligible" (Pet. App. 12a) from even applying for a license, despite his 25 years of service in the Navy Reserves, his 12 years of active duty as a Navy SEAL, his Department of Defense Top Secret Security Clearance, his extensive experience and training handling small firearms, and his license to carry a concealed handgun in the Commonwealth of Virginia. The sole reason why the State refused

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[7] *See* Ala. Code § 13A-11-85 (reciprocity); Alaska Stat. § 18.65.775 (reciprocity); Ariz. Rev. Stat. §§ 13-3112(U) (reciprocity), 13-3112(V) (allowing temporary possession by nonresidents with valid permits from their home state); Ark. Code §§ 5-73-309(2), 5-73-401 (reciprocity); Colo. Rev. Stat. § 18-12-213 (reciprocity); Conn. Gen. Stat. § 29-28(f) (allowing nonresidents with home-state permits to apply for a Connecticut license on the same terms and conditions as in-state residents); Fla. Stat. § 790.015 (allowing nonresidents with valid home-state licenses to carry a concealed handgun); Ga. Stat. Ann. §§ 16-11-126(e), 16-11-128(c); Haw. Rev. Stat. § 134-9(a) (allowing nonresident to show "exceptional" circumstances justifying a license); Idaho Code § 18-3302(12)(g) (nonresident with home-state license in his physical possession may carry a concealed weapon); Ind. Code § 35-47-2-21(b) (recognizing out-of-state licenses for nonresidents); Iowa Code § 724.11 (not recognizing out-of-state licenses, but allowing nonresidents to apply for a license upon terms and conditions applicable to in-state residents); Ky. Rev. Stat. § 237.110(17)(a) (reciprocity); La. Rev. Stat. § 40:1379.3(T)(1) (reciprocity); Me. Rev. Stat. tit. 25, § 2001-A(2)(F) (discretionary power to grant reciprocity to a holder of a valid concealed firearms permit issued in another State); Mich. Comp. Laws § 28.432a(f) (reciprocity); Minn. Stat. § 624.714, subd. 16 (reciprocity); Miss. Code § 45-9-101(19) (reciprocity); Mont. Code § 45-8-329 (reciprocity); Nev. Rev. Stat. § 202.3657(1) & (2) (governing nonresident applications for licenses); N.H. Rev. Stat. § 159:6-d (reciprocity); N.J. Stat. Ann. § 2C:58-4(c) (providing for applications by nonresidents); N.C. Gen. Stat. § 14-415.24 (reciprocity); N.D. Cent. Code § 62.1-04-03.1 (reciprocity); Ohio Rev. Code § 2923.126(D) (reciprocity); Okla. Stat. tit. 21, § 1290.26 (reciprocity); 18 Pa. Cons. Stat. § 6109(k) (reciprocity); R.I. Gen. Laws § 11-47-11 (providing for licensing of nonresidents who have a home-state license and show a "proper reason" and "suitab[ility]"); S.C. Code § 23-31-215(N) (reciprocity); S.D. Codified Laws § 23-7-7.3 (reciprocity); Tenn. Code § 39-17-1351(r) (reciprocity); Texas Gov't Code § 411.173(b) (reciprocity); Utah Code § 76-10-523(2) (reciprocity); Va. Code Ann. § 18.2-308(P) (reciprocity); W. Va. Code § 61-7-6(7) (reciprocity); Wyo. Stat. § 6-8-104(a)(iii) & (b)(i) (reciprocity).

even to entertain his application, and consider his eminent qualifications, was that he is not a permanent resident of the State of New York. The State and the court below acknowledged as much. *See* Pet. App. 2a-3a; *see also People v. Perez*, 325 N.Y.S.2d 183, 186 (N.Y. Sup. Ct. 1971) (noting that the law "seems discriminatory").

The Second Circuit upheld the law's constitutionality, however, on the ground that the State's interest in "monitoring" licensees justified excluding those who are not permanent residents of the State. In crediting the State's justification, the court violated two clear commands of this Court's privileges and immunities case law. First, the court of appeals accepted the State's justification without insisting, as this Court has, on evidence to support the alleged risks posed by nonresident licensees. *Compare Piper*, 470 U.S. at 285 ("There is no evidence to support [the State's] claim that nonresidents might be less likely to keep abreast of local rules and procedures."). Second, the court improperly rejected alternative means short of excluding nonresidents by which the State's monitoring interest could be preserved. *See Friedman*, 487 U.S. at 67. This Court's review is needed to prevent New York from persisting in its improper refusal to allow virtually all nonresidents, however qualified, from even applying for a handgun license. *Cf. Lunding v. New York Tax Appeals Tribunal*, 520 U.S. 1227 (1997) (granting certiorari to review New York's discriminatory tax law).

A. The Right To A Firearm License Is A "Privilege" Protected By Article IV, § 2

Although the Second Circuit deemed it unnecessary to reach the issue, Bach's right to apply for and, if qualified, to obtain a license to carry a firearm constitutes a "privilege" of citizenship that is protected by the Privileges and Immunities Clause of Article IV. Under this Court's cases, the "fundamental principles" protected by the Clause include the right of citizens to "the enjoyment of life and liberty . . . and to pursue and obtain happiness and safety." *Corfield v. Coryell*, 6 F. Cas. 546, 551-52

(C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J.). *See also Piper*, 470 U.S. at 281 n.10 (citing *Corfield* for question of "'fundamental rights' protected by the Clause"); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978) (same). These need not be rights independently protected by the Constitution; the Clause allows nonresidents to engage in a number of pursuits that could be proscribed by the State if it were to do so without regard to residency. *See, e.g.*, *Toomer*, 334 U.S. at 396 (commercial shrimp fishing). Moreover, this Court has made clear that the privileges protected by the Clause include both commercial and noncommercial pursuits. *See Piper*, 470 U.S. at 282 (observing that this Court "has never held that the Privileges and Immunities Clause protects only economic interests"; emphasizing the commercial and "noncommercial role" of the legal profession in striking down state residence requirement for bar admission). Ultimately, the relevant test for protection is whether the right at issue is central to national citizenship, or whether it may be left to individual States to dispense as a perquisite of State citizenship. *See Baldwin*, 436 U.S. at 383 (although "'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity" must be respected for residents and nonresidents alike, some distinctions are allowed because they "merely reflect the fact that this is a Nation composed of individual States").

The right to self-defense through use of a firearm squarely falls into the protected category, as this Court previously has recognized. *See* Levinson, *Second Amendment*, 99 Yale L.J. at 651 (observing that, in a part of the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857), that the Court subsequently has never questioned, the Court concluded that the right of citizenship included, "in addition to the right to migrate from one state to another, . . . the right to possess arms"). This Court has also gone so far as to suggest that a ban on "pistols that may be supposed to be needed occasionally

for self-defense" might violate the "liberty" clause of the Fourteenth Amendment. *Patsone*, 232 U.S. at 143.

The right to personal safety, as ensured through the carrying of firearms, has deep historical roots. New York itself recognizes that the proposition that "decent citizens generally may employ means to defend themselves from ruffian or underworld aggression in an appropriate manner should hardly be open to debate." *People ex rel. Ferris v. Horton*, 264 N.Y.S. 84, 89 (N.Y. Sup. Ct. 1933), *aff'd*, 269 N.Y.S. 579 (N.Y. App. Div. 1934). As discussed above, the Founders viewed the right as important. *See supra* pp. 11-13. Today, virtually every State permits its own citizens to carry a concealed weapon for self-protection, usually with a license. *See* DOJ Statistics Report at 12.

Nonresidents such as Bach, no less than New York residents, have a "substantial stake" in their personal safety and self-defense when traveling throughout or staying within the State. This Court has concluded that, "[j]ust as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade, so must it protect persons who enter Georgia seeking the medical services that are available there." *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (citations omitted). The right to protect one's safety, or the safety of one's family, is no less "fundamental" than the right to protect one's health through guaranteed access to medical services. *See also Friedman*, 487 U.S. at 68 (observing nonresident's "substantial stake in the practice of law in Virginia"). New York therefore must substantially justify its discrimination in denying this privilege to nonresidents.

B. The Second Circuit's Decision Conflicts With This Court's Requirement That The State Justify Discrimination Through A Showing That Nonresidents Are The "Peculiar Source" Of An Evil That The State Cannot Address Through Less Restrictive Means

To show sufficient justification for denial of a protected privilege to nonresidents, the State bears the burden

under this Court's cases to demonstrate that "'(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (quoting *Piper*, 470 U.S. at 284). Put differently, the State must establish that nonresidents are the "peculiar source of the evil" to which the statute is narrowly tailored. *Toomer*, 334 U.S. at 398. Both requirements are dictated by this Court's clear holdings, and the Second Circuit's failure to require a substantial justification from the State violates settled law.

The court of appeals improperly deferred to the State's assertion of substantial need without any factual showing to support it. The court held that "New York's monitoring interest is, in essence, an interest in continually obtaining relevant behavioral information." Pet. App. 27a. The court then simply opined that it was "self-evident that, at least in Bach's case, other States, like Virginia, cannot adequately play the part of monitor for the State of New York or provide it with a stream of behavioral information approximating what New York would gather. They do not have the incentives to do so." *Id.* at 29a.

The court of appeals' "self-evident" observation is highly disputable, and the State proffered no evidence whatsoever to support it. *Compare Piper*, 470 U.S. at 285 ("There is no evidence to support [the State's] claim that nonresidents might be less likely to keep abreast of local rules and procedures."). Indeed, the court ignored the fact that Bach is licensed in Virginia, which therefore has a clear incentive to monitor Bach to ensure that his continued licensing in that State is proper. New York's unsubstantiated assumption that Virginia or other States would be less vigilant in monitoring their own citizens who are licensed to carry handguns is precisely the kind of discrimination that the Privileges and Immunities Clause was meant to prohibit. The court should not have credited that assumption without insisting on some evidence

that other States' monitoring of their own licensed citizens in general—and Virginia's, in particular—is less effective than the type of monitoring that New York can provide. Indeed, the State did not even present evidence that its monitoring of its own residents was effective.

Moreover, under this Court's case law, a discriminatory remedy is a last resort and must fail where there are "less restrictive means" of remedying out-of-state harms, *Piper*, 470 U.S. at 284, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy," *Hicklin*, 437 U.S. at 526. Here, the court of appeals improperly dismissed a number of less restrictive alternatives that would have satisfied the State's legitimate interests without denying Bach the opportunity to be eligible for a license. As Bach argued below, New York could simply do as many other States do—*i.e.*, recognize, through reciprocity agreements, a valid out-of-state handgun license. If Bach's Virginia license were revoked, his rights to possess or carry a handgun in New York could likewise be terminated. The State also could require more frequent and more rigorous proof of qualification from nonresident applicants—*e.g.*, more frequent renewals; certification from local and state authorities where the applicant is domiciled that he or she has not been convicted of a crime and meets other qualifications; or periodic interviews by the nonresident licensee with local officials. *See Friedman*, 487 U.S. at 69 (noting the existence of alternatives such as "requir[ing] mandatory attendance at periodic continuing legal education courses" or mandatory "*pro bono* work"). If the State had evidence of higher costs of investigation or enforcement, the State simply could require higher application fees for nonresidents to offset those costs. *See Toomer*, 334 U.S. at 398-99 ("The State is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden."). The court below erred in dismissing these alternatives as inadequate without development of any factual record.

Finally, the monitoring rationale credited by the court of appeals is at odds with this Court's recent decision in *Granholm v. Heald*, 125 S. Ct. 1885 (2005). That decision struck down under the Dormant Commerce Clause Michigan and New York laws that regulated the sale and importation of wine by out-of-state wineries. Among the justifications for the law proffered by New York was the same monitoring justification advanced here—that the State had to require out-of-state wineries to maintain a physical presence in the State to facilitate tax-collection and regulation and monitoring of behavior. The Court opined that "New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping," and that "[t]he State offers no reason to believe the system would prove ineffective for out-of-state wineries." *Id.* at 1906. Likewise, the Court observed "that improvements in technology have eased the burden of monitoring out-of-state wineries," and thus "the States provide little *concrete evidence* for the sweeping assertion that they cannot police direct shipments by out-of-state wineries." *Id.* at 1907 (emphasis added). In *Granholm*, this conclusion was fatal to New York's attempt to justify the discriminatory statute, because "[t]he burden is on the State to show that the discrimination is demonstrably justified." *Id.* (internal quotation marks omitted). The same analysis dooms the New York law under Article IV, § 2.

New York's gun law is yet another in a line of New York statutes that engage in sweeping and unjustified discrimination against nonresidents. *See also Granholm*, 125 S. Ct. at 1885; *Lunding*, 522 U.S. at 298 (concluding that New York failed adequately to justify its discriminatory tax treatment of nonresidents); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 98 (2d Cir. 2003) (concluding that New York could not justify "the degree of outright discrimination imposed" against nonresidents in its "Lobster Law"). This Court's review is warranted because the court of appeals failed to hold the State to the

required constitutional standard for justifying such discrimination against nonresidents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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